UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

ARKANSAS ALUMINUM ALLOYS, INC.
Employer

and

ERIC GARNER, an Individual
Petitioner

and **Case 26-RD-1103**

THE UNITED ALUMINUM WORKERS OF ARKANSAS
Union

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC
Intervenor[1]

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, Arkansas Aluminum Alloys, Inc. manufactures aluminum ingots at a facility in Hot Springs, Arkansas. The Union has represented a unit of the Employer's production, maintenance, crushing, shipping, receiving, and trucking employees since May 2003. In February 2004 there were 111 employees in the unit. On May 25, 2004, employee Eric Garner filed the petition in this case seeking to decertify the Union.

Following a hearing before a hearing officer of the Board, the Employer, Union, and the Petitioner filed briefs with me. In addition, the Union filed a

[1] The Intervenor's motion to intervene was referred to me. That motion is hereby granted.

motion to correct the transcript. That motion is unopposed and is hereby granted.

As stated at the hearing and in the parties' briefs, the principal issue in this case is whether the petition should be dismissed because of unfair labor practices that were alleged in a complaint in Case 26-CA-21596 and were resolved when the Employer and the Union reached a contract after the petition was filed. More specifically, the complaint alleged that about February 9, 2004, the Employer unlawfully implemented changes in the health insurance plan for unit employees that increased both the deductibles and the premiums.

The Union contends that the petition must be dismissed because the Employer committed unfair labor practices that caused employees to withdraw their support for the Union. The Employer argues that the alleged unfair labor practice conduct cannot be considered because the charge alleging the unfair labor practices was withdrawn after a settlement of the issues and, alternatively, that the unfair labor practices did not taint the petition. The Petitioner contends that since 2003 there has been a "general consensus" among employees that employees would be better off without union representation.

I have considered the evidence adduced during the hearing and the arguments advanced by the parties and have concluded that the petition should be dismissed because the contract was intended by the parties to resolve the unfair labor practices and because there is a causal nexus between the alleged unfair labor practices and the loss of support for the Union.

I. FACTS

A. Background

Prior to May 2003, the Carpenter's union represented the unit. On May 23, 2003, the Union was certified as the collective-bargaining representative of the unit. Around the time of the Union's certification, the Carpenter's Union gave notice that it would no longer insure unit employees. Thereafter, employees were without health insurance for about a month after which the Employer implemented a self-insured plan providing health insurance for unit employees. During the period of time when employees had no insurance, employees expressed some dissatisfaction with the Union.

In August 2003, the Employer and the Union began negotiations for a collective-bargaining agreement. Prior to the opening of those negotiations, the Union entered into a service agreement with the Intervenor. Jimmy Odent, the Intervenor's sub-district director, chaired the Union's bargaining committee throughout negotiations.

B. Alleged Unfair Labor Practices

At a bargaining session on December 9, 2003, the Employer announced that the health insurance program for unit employees needed to be immediately changed for economic reasons. Thereafter, the parties discussed insurance at several additional sessions.

At a February 9, 2004[2] bargaining session, the Employer told the Union that it would immediately implement changes in the health care system. On

[2] All dates hereafter are in 2004, unless otherwise specified.

February 16, the Employer included a notice in employee pay envelopes that informed employees that effective February 1, the deductible for the major medical component of their health insurance had increased from $500 to $1500 and that premiums were being increased for all types of coverage. The premium increases were about 60 percent for all types of coverage. The increases ranged from an additional $22.83 per month for employee-only coverage of an employee with more than 2 years seniority to an additional $125.97 per month for family coverage for an employee with less than 2 years seniority. The specific amounts of all increases and the number of employees with each type of coverage at the time of the change are shown below.

Type of Coverage	Previous Employee Premium	New Employee Premium	Amount of Increase	Number of Employees
Employees with less than 2 years seniority				
Single	$64.26	$102.80	$38.54	30
Employee/Child	$140.66	$225.10	$84.44	4
Employee/Spouse	$181.70	$290.71	$109.01	4
Family	$209.99	$335.96	$125.97	11
Employees with more than 2 years for seniority				
Single	$38.09	$60.92	$22.83	19
Employee/Child	$89.53	$143.28	$53.75	4
Employee/Spouse	$130.56	$208.89	$78.33	21
Family	$158.86	$254.14	$95.28	18

The notice also stated that the Employer understood the impact of increasing the deductible. It explained that the Employer had met with the Union for a number of days discussing other options that would have retained the $500 deductible that would not have such a “dramatic impact” on premium contributions, but the Union had rejected every option offered by the Employer. The notice further stated that to avoid the “catastrophic premium increases”

required to maintain the $500 deductible plan, the Employer had no option but to implement this plan effective February 1.

At a minimum, employees are required to have employee-only (single) coverage. At the time of the increases, 49 employees had employee-only coverage. After the increases became effective, four employees switched from another type of coverage to employee-only coverage, the least expensive type of coverage.

On March 5, the Union filed a charge in Case 26-CA-21596 alleging that the Employer unlawfully implemented increases in employees' health insurance premium payments and deductibles. On December 30, the Regional Director issued a complaint in that case alleging that about February 9, 2004, the Employer violated Section 8(a)(5) of the Act by implementing increases in employees' health insurance premium payments and deductibles without reaching an impasse in negotiations for health insurance and thereby failed to provide the Union with an adequate opportunity to bargain over that conduct and the effects of that conduct.

C. Decertification Petition

Between May 20 and 24, signatures were obtained in support of the decertification petition in this matter. The petition was filed on May 25, two days after the expiration of the certification year.

D. Collective-Bargaining Agreement and Settlement of the Unfair Labor Practices

The Union and Employer reached agreement on a collective-bargaining agreement that was signed on January 12, 2005 and is effective until January 12, 2006. The agreement provides that, in settlement of issues between the Employer and the Union, upon withdrawal of Case 26-CA-21956, the Employer would pay $50,000 toward employee insurance premiums. Specifically, the agreement provides:

> As settlement of all issues between the Company and the Union (other than pending grievances) the Company will make a one-time contribution of $50,000 toward insurance premiums. This payment is subject to the UAWA withdrawal, and the NLRB's agreement to dismiss Case Number 26-CA-21956. Upon dismissal of Case Number 26-CA-21956, the Company will make contributions toward premiums as follows, until a total of $50,000 has been contributed:
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> | | |
> |---|---|
> | Employee | $18.45 per month |
> | Employee/Child | $43.79 per month |
> | Employee/Spouse | $49.32 per month |

Pursuant to the Union's request to withdraw the charge in Case 26-CA-21956, the complaint was dismissed on January 20, 2005.

II. ANALYSIS

I have determined that this case presents two issues: (1) whether the petition should be dismissed because the collective-bargaining agreement between the parties provided for settlement of the unfair labor practice charge; and (2) whether the alleged unfair labor practices tainted employee expressions of disaffection with the Union. As set forth below, I conclude that the petition should be dismissed for both of these reasons.

A. The Impact of the Collective-Bargaining Agreement and Settlement of the Charge

The Employer contends the non-Board settlement agreement renders the underlying unfair labor practices moot because the Union withdrew its unfair labor practice charge as part of a settlement. However, the Union withdrew the charge as a result of a collective-bargaining agreement that provides for settlement of the unfair labor practice charge. That agreement also provides that the Employer will pay $50,000 toward the insurance premiums of its employees in exchange for an approved request by the Union to withdraw the unfair labor practice charge.

In *Supershuttle of Orange County,* 330 NLRB 1016 (2000), the Board dismissed a decertification petition where unfair labor practices preceding the petition were settled by a contract between the parties. The Board held that since the contract "was intended by the parties to, and effectively did, resolve the outstanding unfair labor practice charges, the bargaining agreement therefore serves as a bar to the representation petition." Id. at 1018. The Board concluded that it would effectuate the Act's goals of "fostering stable labor relationships, promoting peaceful settlements, and encouraging collective bargaining" to apply the principles of its decisions in *Douglas-Randall, Inc.*, 320 NLRB 431 (1995) and *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998) to situations where the parties have reached agreement on a collective-bargaining agreement intended by them to resolve the unfair labor practices In *Douglas-Randall*, the Board returned to the policy of dismissing a decertification petition filed subsequent to alleged unfair

labor practice conduct where the charges are resolved by a Board settlement agreement in which the employer agreed to recognize and bargain with the union. In *Liberty Fabrics*, the Board extended *Douglas-Randall* to cases involving a private settlement agreement between the parties, rather than an informal Board settlement.

Here, as in *Supershuttle,* the unfair labor practices that preceded the petition were resolved by the parties reaching an agreement on a contract that was intended to and did resolve the unfair labor practice issues. Accordingly, that agreement serves as a bar to the representation petition and I will dismiss the petition in this case.

B. The Impact of the Alleged Unfair Labor Practices

To determine whether the petition should be dismissed based on a causal nexus between unfair labor practices and employee disaffection with a union, the Board uses the multi-factor test set forth in *Master Slack*, 271 NLRB 78, 84 (1984). *Overnite Transportation, Co.*, 333 NLRB 1392, 1392-1393 (2001). See also *Saint Gobain Abrasives, Inc.*, 342 NLRB No. 39 (2004). Those factors are: (1) the length of time between the unfair labor practices and the filing of the petition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

In *Saint Gobain,* the Board noted that in applying the *Master Slack* factors to an allegation of a unilateral change in insurance it would be appropriate to

examine factors such as how many employees incurred an increase in the cost of health care; the amount of the increase; how many employees enrolled in different plans as a result of the alleged unilateral change; how many employees switched health care givers as a result of the change; and how many employees expressed dissatisfaction with the Union prior to the change. *Saint Gobain Adhesives, Inc*., supra, slip op. at 1. Since this case, like *Saint Gobain*, involves a change in health insurance coverage, I will address those specific questions in applying the *Master Slack* factors here.

1. Length of time between unfair labor practices and filing of the petition

The showing of interest in support of the decertification petition was signed about three months after the announcement that employees would pay more for insurance premiums and have higher deductibles. In considering that timing, I note that because of the Union's certification on May 23, 2003, no petition could be filed until the certification year expired on May 23, 2004. See e.g. *Americare-New Lexington Health Care Center*, 316 NLRB 1226 (1995). The petition in this case was filed on May 25, two days after the certification year expired. Accordingly, the length of time between the alleged unfair labor practices and the decertification effort is consistent with a finding of a causal nexus. See *Priority One Services*, 331 NLRB 1527 (2000) (Board found likely taint was demonstrated by the fact that the petition was filed only slightly more than 2 months after the unilateral changes.)

2. Nature of the illegal acts, including the possibility of detrimental or lasting effect on employees

While the Union and Employer were negotiating their first contract, the Employer announced significant increases in health insurance premiums and deductibles. The deductibles increased by $1000, from $500 to $1500, and the insurance premiums increased by about 60 percent.

With regard to the possibility of detrimental or lasting effects of the changes, the Employer acknowledged in its February 16 notice to employees that it understood the impact of increasing the deductible. In that notice, the Employer also claimed that it met with the Union to discuss options to retain the $500 deductible, but the Union had rejected every option the Employer offered and, in the absence of an agreement with the Union, it was forced to implement this plan.

Any unilateral change may have a detrimental or lasting effect on employees because they are confronted with the imbalance in bargaining positions of the parties. Unilateral changes during bargaining also alter the expectations of the parties about what they can achieve and make it more difficult to reach an agreement. *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002). Here, the unilateral increases in insurance premiums and deductibles undercut the Union's bargaining position in attempting to agree to a first contract after certification. The Employer's conduct was likely to create a lasting impression of the Union as ineffective in bargaining, causing a detrimental effect on the relationship between the Union and employees. Id.

3. Any possible tendency to cause employee disaffection from the union

To examine the tendency of the alleged unfair labor practices to cause disaffection, it is appropriate to consider the number of employees impacted and the extent of that impact. Because the Employer requires all employees to have some type of health insurance, all unit employees were impacted by the increase in the deductible and the increase in premiums. More than half of the unit, 58 employees, had premium increases in excess of $75 per month. Although only four employees responded by changing the type of coverage to something less expensive, 49 of the 111 employees already had the least expensive coverage, employee-only coverage. Because they were required to have health insurance, those 49 employees did not have the option of changing to less expensive coverage or in any other way decreasing the amount of the health insurance premium they were required to pay.

It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the union's status as bargaining representative, in effect undermining the union in the eyes of the employees. *Priority One Services*, 331 NLRB at 1527, quoting *Page Litho, Inc.*, 311 NLRB 881 (1993). Increases of 9.5 percent in health insurance premiums coupled with a change in method of refunding excess benefits have been held serious enough to undercut the union's ability to function as the employees' bargaining representative. *Priority One Services*, supra. That is so because the changes directly impact employee compensation, one of the fundamental

subjects concerning which employers must bargain. Id. Accordingly, it is clear that unilateral increases of 60 percent, coupled with a $1000 increase in the deductible, would have a very substantial tendency to undermine the Union and cause employee disaffection.

4. Effect of unlawful conduct on employee morale, organizational activities, and membership in the union

With respect to employee dissatisfaction with the Union prior to the unilateral changes, there was testimony about employee dissatisfaction around the time the Union was selected in May 2003. The Petitioner also testified that at least 30 employees expressed "dissatisfaction" with the Union during the period between about June 2003 and February 16, 2004. No details were provided regarding the extent of or the reason for that dissatisfaction.

With regard to employee disaffection after the increases were implemented, the Union's witnesses offered testimony about conversations with three employees regarding statements the employees made regarding the unilateral change. Although I find their testimony is admissible under the state of mind exception to the hearsay rule, Federal Rules of Evidence 803(3), I decline to rely on that testimony. In inquiries of this type, I believe the inquiry is best served by more objective evidence such as resignations from the union or a decline in the total number of employees attending union meetings, rather than testimony about what individual employees said about the unfair labor practice or their support or lack of support for the union. That will also avoid the objection, discussed below, of allowing certain employee statements, but not others. Here,

although there was testimony regarding three employees' desires to resign from the union, no documentary evidence of a resignation was offered into evidence.

At hearing and in its brief the Employer objected to the hearing officer's exclusion of testimony that would identify the employees who signed the decertification petition and their reasons for signing the petition. In *St. Gobain Abrasives, Inc.*, 349 NLRB No. 39, fn. 2 (2004), the Board stated that the relevant inquiry does not ask employees why they chose to reject the union. That statement is consistent with the Board's longstanding, overriding concern of the confidentiality interests of employees in not disclosing who signed union authorization cards or attended union meetings. *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) (Board held that employer counsel was prohibited from obtaining on cross-examination the names of the employees who attended union meetings and signed authorization cards.) In this regard, the Board has always held authorization cards in confidence during representation cases. See e.g. *Midvale Co*., 114 NLRB 372, 374 (1955). Consistent with this rule, the courts have held that an employer is not entitled to obtain the disclosure of union authorization cards under the Freedom of Information Act, 5 U.S.C. § 552. See *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977); *Madeira Nursing Center v. NLRB*, 615 F.2d 728 (6th Cir. 1980); *Pacific Molasses v. NLRB*, 577 F.2d 1172 (5th Cir. 1978); *NLRB v. Biophysics Systems, Inc*., (S.D.N.Y. 1976). These confidentiality concerns are equally applicable to decertification petitions.

Accordingly, I find that the hearing officer appropriately excluded evidence about who signed the petition, as that evidence would improperly violate the confidentiality interests of employees.

5. Conclusion

Based on the above factors and without relying on any evidence concerning employee statements after the unilateral changes, I conclude that there is a causal nexus between the unilateral increases in unit employees' insurance and the signatures offered in support of the decertification petition. Those signatures were obtained about three months after the unilateral changes. All unit employees were affected by the increased costs of health insurance, which were substantial. The Employer's conduct in this matter was of a type that would have a detrimental and lasting effect on employees because it would undermine the Union in the eyes of the employees with regard to a matter of employee compensation, one of the fundamental subjects concerning which employers must bargain.

CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union claims to represent certain employees of the Employer.
4. The Union and the Intervenor are labor organizations within the meaning of the Act.
5. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act because the collective-bargaining agreement between the Employer and the Union was intended by the parties to, and effectively did, resolve the outstanding unfair labor practice charge and because a causal relationship exists between the Employer's conduct alleged in the complaint and the employee disaffection reflected in the filing of the decertification petition.

ORDER DISMISSING PETITION

I hereby order that the petition filed in this case is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **May 11, 2005.** The request may not be filed by facsimile.

DATED, at Memphis, Tennessee, this 27th day of April 2005.

/s/[Ronald K. Hooks]

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